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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, ET AL ____ *Appellants*

v.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS ____ *Appellee*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR REHEARING

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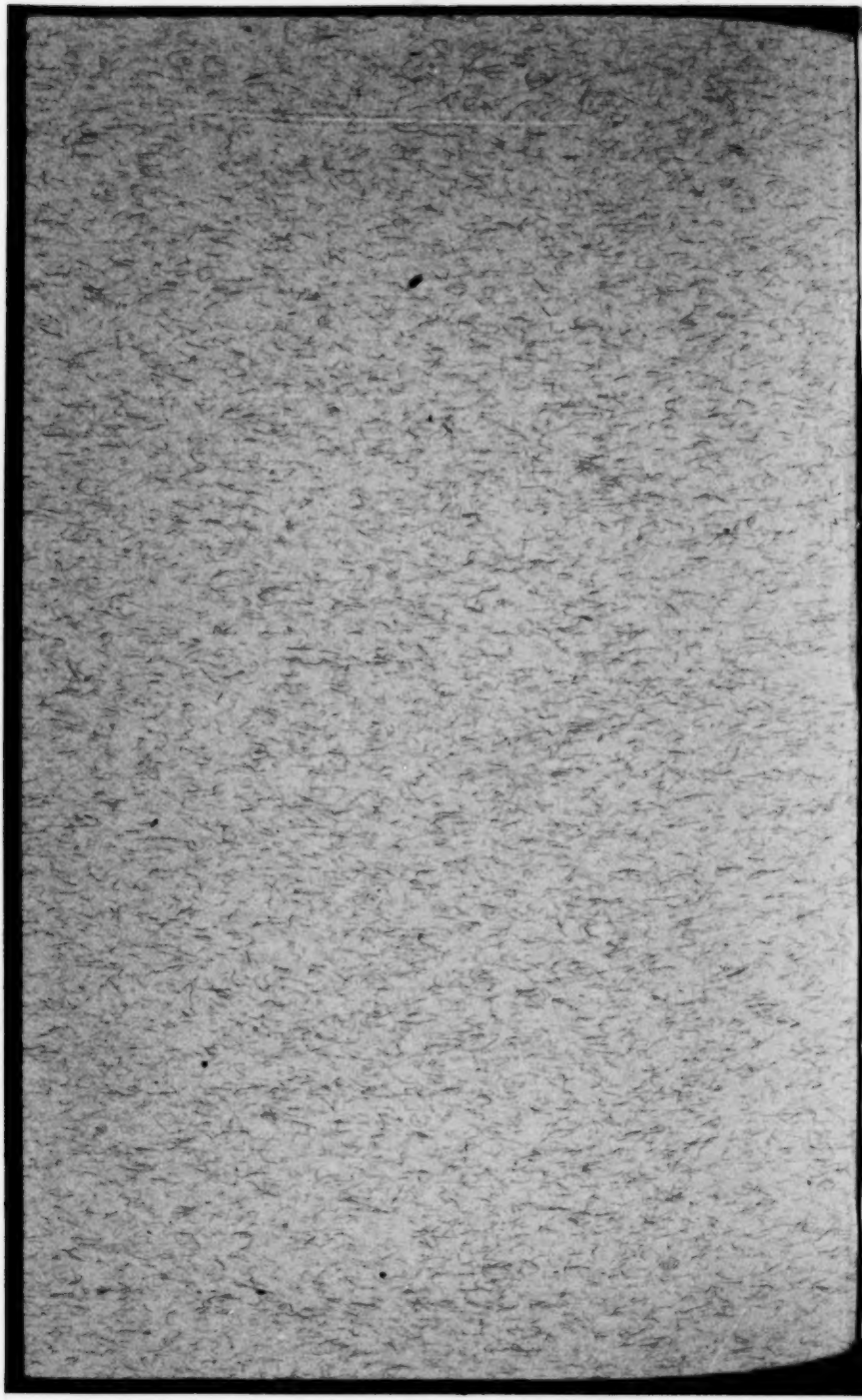

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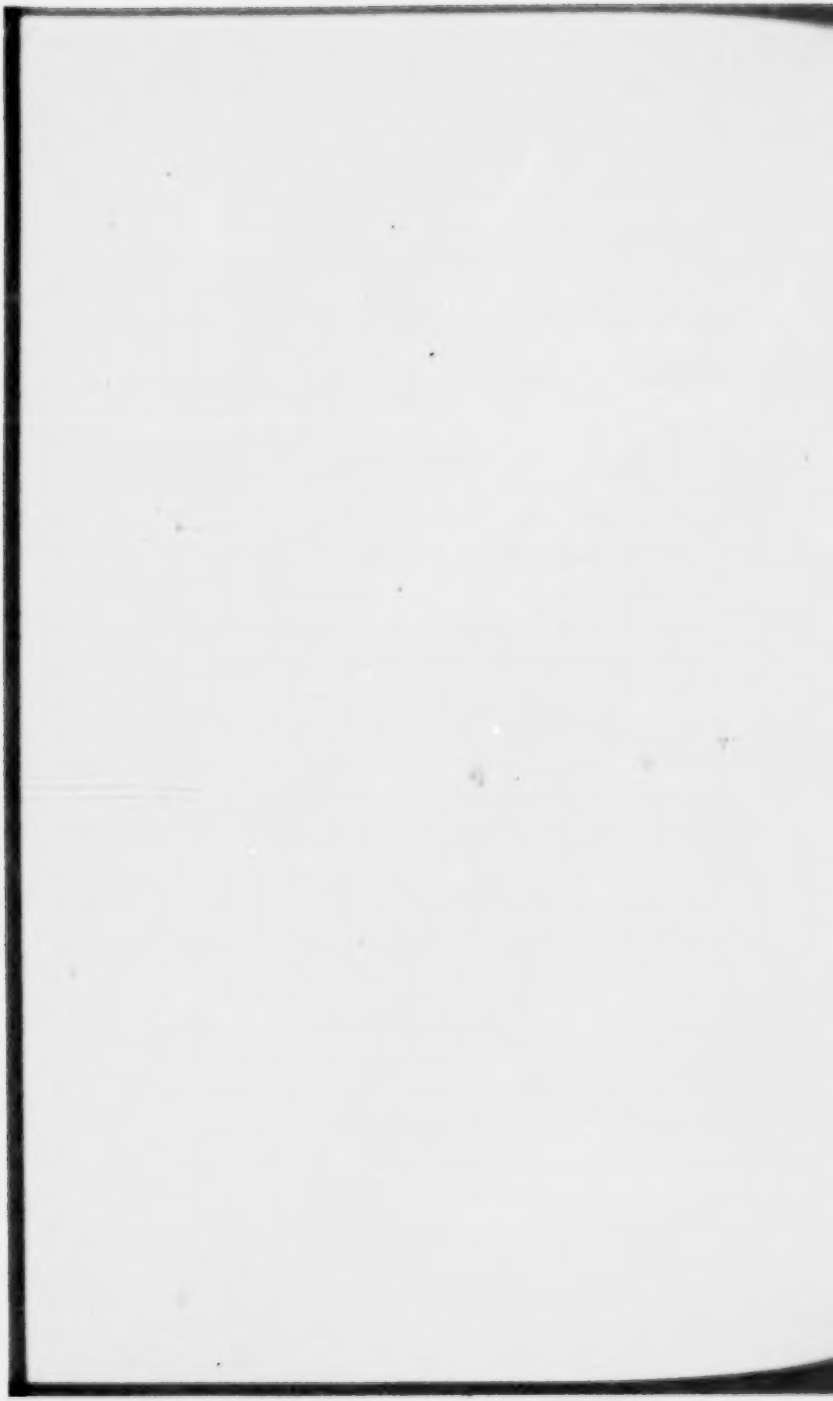

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, AND THE ARKANSAS RADIO AND EQUIPMENT COMPANY, A CORPORATION (KARK BROADCASTING STATION) ..... *Appellants*

v.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS ..... *Appellee*

No. 4-8881

PETITION FOR REHEARING

Come now Petitioners, Sheldon C. Vinsonhaler, A. L. Chilton and Leonore H. Chilton, a Partnership, d/b/a KGHI Broadcasting Service, et al, and respectfully move the Honorable Court to grant Rehearing in this case, and for grounds therefor would show the following:

I

The Court erred in holding that there was no substantial federal question involved in this appeal.

On November 7, 1949, this Court did enter the following *per curiam order*:

> "The appeal is dismissed for want of a substantial federal question. *Crutcher* v. *Kentucky*, 141 U. S. 47. Mr. Justice Douglas took no part in the consideration or decision of this case."

The appeal herein involves the validity of a municipal privilege tax as applied to radio stations, *a business long recognized as being engaged in interstate commerce.* The argument which Petitioners advance to invalidate same is that such a tax levies a direct burden upon interstate commerce contrary to both the spirit and letter of Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause thereof). Petitioners verily believe that this presents a substantial federal question in that the field of radio has been accepted since the year 1913 as an instrumentality of commerce as evidenced by the multitude of rigorous legislation enacted by Congress creating, controlling and eliminating *all* radio stations. Were it not such commerce, how could the Federal Communications Act, 47 U.S.C.A. Secs. 151, *et seq*, be justified, and how could employees of radio stations be held to come under the provisions of the Wage and Hour Law, 29 U.S.C.A. Secs. 201, *et seq.* Very clearly then, in the light of such legislation (and subsequent decisions of this Court upholding those laws as applicable to the field of radio), radio is interstate commerce. Mr. Justice Stone, in the case of *Fisher's Blend Station* v. *Tax Commission of Washington*, 1936, 297 U. S. 650, 80 L. ed. 956, settled this question in the following language:

> "The essential purpose and indispensable effect of *all* broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. *By its very nature broadcasting transcends state lines and is national in its scope and importance—*

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characteristics which bring it within the purpose and protection, and subject it to the control of the commerce clause. See Federal Radio Commission v. *Nelson Bros. Bond & Mortg. Co.*, 289 U. S. 266, 77 L. ed. 1166, 89 A.L.R. 406." (Italics supplied.)

Thus, as we have an established instrumentality of interstate commerce and an attempt by a municipality to levy a privilege tax upon that commerce, it is difficult to understand why no substantial federal question is involved in this appeal. To so hold would appear to be a decided departure from well established efforts on the part of our national government (and its courts) to protect and foster commerce between the several states and between foreign countries. Surely we are not yet prepared to establish the principle that interstate commerce may be subjected to any and every form of state and local privilege taxation (or other controls) which they may variously (and vicariously in many instances) choose to enact and impose. Whether or not a particular state or local tax may be validly enacted and levied upon interstate commerce presents another question, a question which has on a host of occasions demanded the serious and considered deliberation of this Court. But certainly each and every form of such attempted taxation presents a substantial and serious question which should be carefully considered. Insofar as Petitioners are able to ascertain, this is the first instance that such a tax as levied by Little Rock Ordinance No. 7573, here questioned, has been attempted, and Petitioners believe that its validity presents a very serious and substantial federal question.

II

The Court erred in citing the case of Crutcher v. ***Kentucky*****, 141 U. S. 47, *as authority to substantiate its***

decision that no substantial federal question was here involved, since this case is authority directly contrary.

The case of *Crutcher* v. *Kentucky, supra,* which the Court cited in dismissing this appeal came to the Court on a Writ of Error from the Court of Appeals of Kentucky which latter court had held valid a State license tax as applied to a foreign corporation doing an express business in the State. The defendant in the lower court was a local agent of the United States Express Company, a foreign corporation, and upon their failure to comply with this Kentucky license law, the agent was indicted and fined for noncompliance, as provided for in the law. The law provided, *inter alia,* that before any agent of a foreign express company could begin business in the State he would have to procure a license. A statement as to financial condition of the corporation was required as was the payment of a small fee for the procurement of said license. It was shown that approximately one-fourth of the express company's business was done entirely within the State of Kentucky, and state authorities argued that this was sufficient basis to uphold the license as they construed the license law to apply only to the intrastate business. Reversing the Court of Appeals of Kentucky and holding the tax invalid, Mr. Justice Bradley, who delivered the majority opinion, said at page 58 thereof:

> "We have repeatedly held that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Pickard* v. *Pullman So. Car. Co.,* 117 U. S. 34; *Robbins* v. *Shelby County Taxing Dist.,* 120 U. S. 489; *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Asher* v. *Texas,* 128 U. S. 129; *Stoutenburg* v. *Hennick,* 129 U. S. 141; *McCall* v. *Cali-*

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fornia, 136 U. S. 104; *Norfolk & W. Ry. Co.* v. *Penn.,* 136 U. S. 114."

And again at page 62 Mr. Justice Bradley said:

> "This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate any more than upon foreign commerce; and that all Acts of legislation producing any such result are, to that extent, unconstitutional and void. *And as, in our judgment, the law of Kentucky now under consideration, as applied to the case of the plaintiff in error, is open to this objection, it necessarily follows that the judgment of the court of appeals must be reversed.*" (Italics supplied.)

Obviously the Court in this *Crutcher Case, supra,* held a state license tax invalid as applied to interstate commerce. In the case at bar we have a privilege (license) tax and a formerly professed instrumentality of interstate commerce against which the tax is sought to be applied. How then can it be said that the *Crutcher Case, supra,* is authority for holding that there is no substantial federal question involved in this appeal. In answer to this last the Court apparently either (1) abandoning the theory that radio is an instrumentality of interstate commerce; or (2) that any state or local license (privilege) tax is valid against that interstate commerce. In either event it would appear that if the state of the law is to be so altered it would warrant a detailed opinion to this effect in order that the true intent might be better understood by those affected. As to arguments that might be advanced to substitute or invalidate this particular levy,

that is another question to be considered at a later state of the case.

By way of *dicta* in the *Crutcher case, supra,* there does appear the following statement at page 59 of the opinion:

> "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a State by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the State."

Should this *dicta* be the portion of the *Crutcher Case, supra,* upon which the Court relies to refuse jurisdiction in this case, by inference the Court overrules the *Fisher's Blend case, supra* (and all of the other cases in which this Court has said that radio is interstate commerce), and it might be further argued with some merit that radio was no longer subject to the many rigorous controls which Congress has heretofore placed upon it. It is not believed that it is the policy of this Court to so summarily and inferentially overrule such important doctrines or to leave the apparent confusion that presently prevails throughout the radio industry as to the true meaning of this decision.

For further substantiation of the true holding of the *Crutcher case, supra,* i.e., that it is not only no authority to refuse to review the case at bar, but is actually sub-

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stantiating argument that the Ordinance here complained of is invalid, all one has to do is look at the long line of cases which have followed the doctrine there laid down—*that a state license tax is invalid as applied to interstate commerce.* It would needlessly burden the purpose of this Petition to review all of these cases, or even a substantial portion, but we would like to refer to the case of *Western Union Tel. Co.* v. *Kansas,* 1910, 216 U. S. 19, wherein this Court again held invalid a state license tax as applied to interstate commerce *and relied on the case of Crutcher* v. *Kentucky, supra, as authority therefor.* In the *Western Union case, supra,* the disputed law required all foreign corporations wishing to do business in Kansas to file an application with a designated state authority stating financial condition, business, etc., and pay a $25.00 filing fee therefor. If granted authority to do business within the state the corporation was then to pay a tax of graduated rates upon the authorized capital of said company. Western Union filed their application and paid the filing fee as required. The Board issued the license subject to the payment of the tax. The Board's order provided specifically that this contingency was not to be construed as preventing the company from transacting their interstate business and the grant of authority and requirement as to payment of the tax related only to the intrastate business. Western Union refused to pay the tax and the state brought action to oust them from the state, which was done, said action being affirmed by the Supreme Court of Kansas. Western Union appealed on the ground that such a tax burdened interstate commerce. Reversing the decision of the Supreme Court of Kansas and holding the law invalid, Mr. Justice Harlan, who delivered the majority opinion, stated:

"The authorities cited show that this Court has guarded with both diligence and firmness the freedom of interstate commerce against hostile state or local action, as such action has been manifested by regulations operating, in some instances, directly, in others indirectly, upon the means or instruments employed in that commerce.

"We repeat that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools. Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a percent of its capital stock a "fee" for the privilege of doing local business. To hold otherwise, is to allow form to control substance."

It is clear from a casual reading of the *Crutcher case, supra,* and the long line of decisions which have followed it, that it has been the consistent practice of this Court for more than a hundred years to carefully scrutinize any form of control or limitation which state and local authorities attempt to place upon interstate commerce—particularly is this true when the attempted restriction or control is done through the medium of taxation, either direct or indirect. Consequently, it is hardly felt that an appeal which presents to this Court the question as to whether a particular form of taxation imposes a burden upon a recognized instrumentality of interstate com-

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merce fails to present a very substantial question which should warrant considered deliberation upon the part of the Court. Otherwise how are we to determine in the future whether a particular control or restriction of interstate commerce by state and local authorities would be a valid or invalid control. A logical conclusion which might be drawn from the denial to review the question here presented is that any state or local privilege tax, regardless of the amount, imposed upon any form of interstate commerce would be valid and, in fact, to question same would not even present a question worthy of consideration by this Court.

In conclusion we respectfully urge this Court to grant Rehearing in this cause for the reasons just discussed.

Respectfully submitted

EUGENE R. WARREN

BRUCE T. BULLION

Counsel for Petitioners

CERTIFICATE

I, Bruce T. Bullion, Attorney for Petitioners, state on oath that this Petition for Rehearing is not presented for purpose of delay and that same is presented in good faith as I verily believe the grounds herein set out are meritorious and correct.

Bruce T. Bullion

BRUCE T. BULLION

Counsel for Petitioners